

STATE OF NEW MEXICO
BEFORE THE SECRETARY OF THE ENVIRONMENT

IN THE MATTER OF
HEARING DETERMINATION REQUEST FOR
THE WASTE ISOLATION PILOT PLANT (WIPP)
DISCHARGE PERMIT RENEWAL AND
MODIFICATION APPLICATION FOR DP-831

DOCKET NO. GWQB 21-19

COMMENTS ON THE HEARING OFFICER'S REPORT
ON BEHALF OF
CONCERNED CITIZENS FOR NUCLEAR SAFETY ("CCNS")

Pursuant to 20.1.4.500(C)(2) NMAC, Concerned Citizens for Nuclear Safety ("CCNS") provides the following comments on the Hearing Officer's Report, filed on November 19, 2021. CCNS's comments cite record evidence that supports a new or limited public hearing for the Discharge Permit 831 ("DP-831") permit renewal and modification application for the Waste Isolation Pilot Plant ("WIPP") due to the disparate treatment received by Low English Proficiency ("LEP") Spanish speakers throughout the defective public participation process. CCNS supports the New Mexico Environment Department ("NMED") authority to insert a permit condition requiring the Permittee, the U.S. Department of Energy ("DOE"), to provide an electronic publicly accessible Information Repository on its website. <https://wipp.energy.gov/> CCNS supports denial of the permit modification request ("PMR") to finish construction and use Salt Cell 5 and Salt Storage Pond 5 and one monitoring well.

CCNS Comments

1. The Hearing Officer's Report ("H.O. Rpt.") and proposed Final Order support granting the renewal and modifications of DP-831. The Hearing Officer failed to explain his rulings so that the Secretary can understand them or the New Mexico Water Quality Control Commission ("WQCC") can review them. 20.6.2.3110.M NMAC and §§ 74-6-5 (N), (O) and (P) NMSA 1978. Further, the Hearing Officer failed to address other issues raised in this proceeding.
2. An administrative ruling that has no adequate explanation must be vacated and sent back. *SEC v. Chenery Corp.*, 332 U.S. 194, 196 (1947). A court cannot create administrative policy and can only affirm or vacate the agency's expressed reasoning. *Id.*
3. A reviewing court may not supply a basis for the agency's action that the agency has not given. *Rio Grande Chapter of the Sierra Club v. N.M. Mining Commission*, 2003-NMSC-005 ¶ 11, 133 N.M. 97, 61 P.3d 806, *Atlixco Coalition v. Maggiore*, 1998-NMCA-134 ¶ 20, 965 P.2d 370.
4. One error that stands clearly in the Record is that the Hearing Officer erroneously agreed with the NMED Ground Water Quality Bureau ("Bureau") and the Permittee that the public participation process and regulatory requirements were met. H.O. Rpt., p. 6 at C. The Hearing Officer ignored the detailed *CCNS Proposed Findings of Fact – Deficient Public Process* discussion about the problems encountered by LEP Spanish speakers throughout the DP-831 process. See ¶ 21: "Information Access was limited for the general public and even more so for the LEP Spanish speaking public" through ¶ 122:

The Bureau's disparate treatment of LEP Spanish speakers during this public process put LEP persons at a great disadvantage compared to English speakers who did not carry the same burden of being obstructed from accessing full information. This unequal situation made it impossible for LEP persons to participate in a meaningful way in the public process for DP-831 and to exercise

their due process rights to participate fully in the Public Hearing process. 20.1.4.300 NMAC (Participation), 20.1.4.400 NMAC (Hearing Procedures), 20.1.4.500 NMAC (Post Hearing Procedures), 20.6.2.3108 NMAC (Public Notice and Participation), 20.6.2.3110 NMAC (Public Hearing Participation), 20.6.2.3112 NMAC (Appeals of Secretary's Decisions), and 20.6.2.3113 NMAC (Appeals of Commission Decisions).”

The Bureau has not met the applicable statutory and regulatory public participation requirements. It has facilitated non-compliant public participation processes.

5. The Hearing Officer used the word “Spanish” 14 times in his Report. Those references were to the work of translators and the public notices that were published in both English and Spanish. H.O. Rpt. pp. 3, 5, 14, 22, 24, 36, 40, 41 and 42. He nullifies the disparate treatment received by LEP Spanish speakers due to the non-compliant public process.
6. The Hearing Officer made important factual mistakes when he ignored the detailed descriptions about the lack of information access on the NMED website, in the Administrative Record, in Information Repositories, and the lack of analyses for “enhanced notifications,” specifically for LEP Spanish speaking persons. *CCNS’s Closing Argument*, Section II.A, B, C, and D, pp. 8 – 16.
7. The Hearing Officer made important factual mistakes when he nullified the detailed descriptions of the public participation problems experienced by LEP Spanish speakers. Examples include: in the revised Public Involvement Plan (“PIP”), in the 2020 and 2021 public notices and other deficient notices, in the defective Fact Sheets for a federal facility. *CCNS’s Closing Argument*, Section III.A, B, and C, pp. 16 – 39.
8. All relevant facts about public participation for DP-831 could not be fully developed during the Public Hearing because the Hearing Officer allowed all public participation guidance documents that are used as standards, including the 2017 Information Resolution Agreement between the Environmental Protection Agency and NMED, the

PIP, and federal environmental justice guidance specifically focused on LEP speakers, to be eliminated as evidence. These relevant documents were prohibited from discussion, and in some cases even from being mentioned, making it difficult, if not impossible, to demonstrate the violations of the pertinent statutes and regulations that occurred during the public participation process.

9. The defects in the DP-831 public participation processes and “other procedural defects,” require a new or limited public hearing. *Martinez v. Maggiore*, 2003-NMCA-043, 133 N.M. 472, 64 P.3d 499.

I write separately to clarify that, in my view, reversal is mandated in this case not because of some technical defect in the notice, **but because the defects in notice, when fully explained and when taken together with the other procedural defects** identified in the opinion, indicate that the purposes of the Solid Waste Act’s hearing requirements were not met. [Emphasis added.]

Judge Pickard (specially concurring ¶ 27).

10. Information Repository. The Hearing Officer made important factual mistakes. The Bureau established a precedent when it added a permit condition for an Information Repository for DP-1793 at Los Alamos National Laboratory (LANL), another DOE site in New Mexico. NMED has the authority to require such a permit condition. “The Department had the authority to – to make this a condition of the permit.” NMED counsel Vigil at TR: 2: 25: 6-7. Further, the *Phelps Dodge Tyrone v. NM Water Quality Control Commission*, 2006-NMCA-115, 140 N.M. 464, 143 P.3d 502 Court held that “NMED is authorized to impose reasonable permit conditions.” ¶ 58.
11. Salt Cell 5 and Salt Storage Pond 5. Instead of inquiring about the needs that would be served by Salt Cell 5 and Salt Storage Pond 5, the Hearing Officer chose to *exclude*, as irrelevant and inadmissible, any evidence of WIPP’s ongoing and future expansion. Any

attempt to recognize the actual need for Salt Cell 5 and Salt Storage Pond 5 *while excluding evidence of future expansion* is fundamentally in error, because it ignores the only relevant time frame and the only possible purpose.

12. Ironically, the Hearing Officer's exclusion of evidence about on-going and future expansion of WIPP, including completion of the construction of and use of Salt Cell 5 and Salt Storage Pond 5 and their future use in support of Shaft 5, resulted in the Permittee not meeting its burden to establish continued future expansion.
13. The erroneous exclusion of evidence of future expansion is supposedly based on the rule that only those segments of the Permit that are proposed for renewal and modification can be addressed in the public hearing process. From this rule, the Hearing Officer concludes that evidence about other parts of the Permit is irrelevant. Permittees failed in their burden of proof because it did not provide a citation to such a rule. The conclusion plainly does not follow. A draft permit contains numerous provisions, any of which may be relevant in a renewal and modification administrative process. "A 'discharge permit' means a discharge plan approved by the department." 20.6.2.7.D(3) NMAC.

A "discharge plan" means a description of any operational, monitoring, contingency, and closure requirements and conditions for any discharge of effluent or leachate which may move directly or indirectly into ground water. 20.6.2.7.D(6) NMAC.

The Permittee failed to meet its burden of proof.

14. The fact that other permit provisions are not proposed for modification does not mean they are irrelevant to consideration. A draft permit is a central part of the renewal and modification process. All permit terms must be included in a draft permit. The Hearing Officer has made clear error by excluding evidence of present and future expansion of the WIPP.

15. Further, the Hearing Officer's Report is insufficient to equip the Secretary to issue a final order. The rules require the Secretary state the reasons for his or her action:

The Secretary may adopt, modify, or set aside the Hearing Officer's recommended decision, and shall set forth in the final order the reasons for the action taken. 20.1.4.500.D(2) NMAC.

16. And, finally, in response to the Hearing Officer's review of my qualifications to provide technical testimony based on CCNS's *Statement of Intent*, the Hearing Officer ruled that I would not be allowed to testify as a technical expert, but "as a general member of the public." TR: 2: 58: 16.

17. At that point, the "liberal construction" provisions applied to my testimony. "Liberal Construction is defined as:

This Part shall be liberally construed to carry out its purpose and the purposes of the statute or statutes and regulations pursuant to which the proceeding at issue is conducted. This part shall also be liberally construed to facilitate participation by members of the public, including those who are not represented by counsel. 20.1.4.100.B NMAC.

18. Permittee's counsel raised an objection that did not apply to a member of the public providing testimony. The Hearing Officer made clear error when he allowed the Permittee's counsel to badger and harass me. TR: 2: 68: 7 – 77: 12.

Conclusion

CCNS recognizes that the DP-831 administrative process is near the end. Saving resources, judicial efficiency, as well as addressing the outstanding and on-going social and environment justice concerns, the Court's holdings in *Martinez*, *Rhino* and *Phelps* demand more from the Hearing Officer than his blanket recommendation to the Secretary for approval of the DP-831 permit renewal and modification. CCNS requests that the Secretary reverse the Hearing Officer's recommended Final Order due to the non-compliant public participation process.

CCNS requests that the Secretary order a new or limited public hearing in keeping with the holdings of *Martinez*, *Rhino* and *Phelps*.

CCNS supports NMED's authority to require the Permittee to establish a DP-831 electronic information repository on its website. <https://wipp.energy.gov>

CCNS opposes the proposed modification that allows completion of the construction and use of Salt Cell 5 and Salt Storage Pond 5 and its related monitoring well. A new or limited public hearing is required.

Respectfully submitted,

/s/ Joni Arends

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Certificate of Service

I hereby certify that on December 6, 2021 a copy of the *Comments On The Hearing Officer's Report on Behalf of Concerned Citizens for Nuclear Safety ("CCNS")* were emailed to the persons listed below:

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